Supreme Court No. 81062-1
Court of Appeals No. 25597-2-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

State of Washington
Petitioner

v.

Ryan J. O'Hara
Defendant/Responent

ANSWER TO STATE'S PETITION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF RESPONDENT

The Respondent is Ryan J. O'Hara, the Defendant in the Superior Court and the Appellant in the Court of Appeals.

II. COURT OF APPEALS DECISION

The Court of Appeals reversed O'Hara's conviction for second degree assault in published opinion No. 25597-2-III, filed November 29, 2007. Respondent accepts the facts as presented in the decision.

III. RESPONDENT'S ANSWERS TO STATE'S PROPOSED GROUNDS FOR DISCRETIONARY REVIEW

1. The State contends that the Court of Appeals holding that, on the facts of this case, a defective self-defense instruction required reversal of O'Hara's criminal conviction conflicts with this Court's decisions in *State v. Scott*, 110 Wn.2d 682, 757 P.2d 492 (1988) and *State v. Lysoski*, 47 Wn.2d 102, 287 P.2d 114 (1955).

Scott and *Lysoski* are distinguishable. The Court of Appeals decision is consistent with Washington statutes and judicial decisions.

2. The State contends that the Court of Appeals erred in holding that O'Hara was prejudiced by the defective instruction, based on the particular facts of this case.

This holding was based on the particular facts of the case. It is not subject to discretionary review under the considerations governing acceptance of review set forth in RAP 13.4(b). Moreover, the holding is correct.

3. The State contends that the Court of Appeals decision raises an issue of substantial public interest that should be determined by this Court.

It does not. The Court of Appeals decision holds merely that, when a defendant claims lawful force as a defense to an assault charge, he has a constitutional right to have this claim decided by a properly instructed jury.

IV. ADDITIONAL ISSUE

O'Hara asks the Court to reverse the Court of Appeals on the issue of whether the Confrontation Clause of the

Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to confront declarants whose out-of-court statements in response to police interrogation implicated the defendant, even though police witnesses communicate this information to the jury without specifying the precise content of the testimonial statements.

V. ARGUMENT

ISSUE 1. The Court of Appeals holding that the defective self-defense instruction required reversal of O'Hara's conviction is in harmony with this Court's decision in *State v. Scott*, 110 Wn.2d 682, 757 P.2d 492 (1988) and other Washington decisions.

The State contends that, in reviewing a challenge to a defective jury instruction raised for the first time on appeal, the Court of Appeals decision conflicts with *State v. Scott*, 110 Wn.2d 682, 757 P.2d 492 (1988) and with *State v. Lysoski*, 47 Wn.2d 102, 287 P.2d 114 (1955). It does not. Both *Scott* and *Lysoski* are distinguishable.

In *Scott*, the trial court gave a version of the accomplice liability instruction exactly as proposed by the defense. *Scott*, 110 Wn.2d at 686. For the first time on

appeal, the defendant challenged the trial court's failure to define the term 'knowledge'. *Id.*

Scott is distinguishable from this case in that (a) the instructional error was invited; and (b) the instruction did not address self-defense. Both *Scott* and *Lysoski* are distinguishable in that (c), unlike the term 'malice' as used by the legislature in the lawful force statute, the term 'knowledge' is not a technical term for which a definition is required; and (d) the instruction at issue here was not omitted – rather it was given in a truncated form that the Court of Appeals found to be misleading to the jury.

Moreover, *Scott* goes on to say: "As our cases hold, and RAP 2.5(a)(3) succinctly states, certain instructional errors that are of constitutional magnitude may be challenged for the first time on appeal. Constitutional errors are treated specially because they often result in serious injustice to the accused" and "because they may adversely affect the public's perception of the fairness and integrity of judicial proceedings." *Scott*, 110 Wn.2d at 686-87.

To determine whether to review a constitutional error asserted for the first time on appeal, the appellate court must examine the claimed error in light of the entire record and the particular facts of the case. *Scott*, 110 Wn.2d at 688.

The appellate court should first satisfy itself that the error is truly of constitutional magnitude, which is to say the error is 'manifest'. *Scott*, 110 Wn.2d at 689. If the error is not a manifest constitutional error, the court may refuse review on that ground.[1] If the claim is constitutional, then the court examines the effect of the error upon the trial, applying the harmless error standard set forth in *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). *Id.*

A. The error was not invited. Mr. O'Hara's trial counsel requested the lawful force instruction, and the court purported to give it. Moreover, 'malice' was defined in the instruction. Counsel did not ask the court to omit any part of the definition and had no reason to anticipate that the

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[1] RAP 2.5(a) permits, but does not require, the Court of Appeals to decline to review an assignment of error not raised below.

court would do so. While defense counsel certainly should request appropriate instructions, a wrongful conviction should not be upheld because counsel, despite due diligence, failed to parse every word. This is what appeals are for.

B. Unlike the appellant in *Scott*, Mr. O'Hara claimed self defense. Once a defendant produces some evidence of self-defense, the burden shifts to the State to disprove self-defense beyond a reasonable doubt. *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). Therefore, the defective self-defense instruction related to an issue the State was required to prove.

An error affecting a defendant's self-defense claim is constitutional. *State v. O'Hara*, Slip Op. at 7, citing *State v. Birnel*, 89 Wn. App. 459, 472, 949 P.2d 433 (1988). A defective jury instruction on self-defense may be raised for the first time on appeal. *State v. Kronich*, 160 Wn.2d 893, 899, 161 P.3d 982 (2007). Due process permits a criminal defendant to be convicted only if the State proves every element upon which it has the burden of proof beyond a reasonable doubt. U.S. Const. amend. 14; Wash. Const. art.

I, § 22; *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Linehan*, 147 Wn.2d 638, 653, 56 P.3d 542 (2002).

It is not sufficient that self defense instructions merely adequately state the law. *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996). Read as a whole, the instructions must make the legal standard for self-defense manifestly apparent to the average juror. *Id.* Reversal is required if the jury could have accepted the defendant's version of the events but nevertheless found him guilty under the erroneous instruction. *O'Hara*, Slip Op. at 7-8; *Birnel*, 89 Wn. App. at 472. That was the case here.

C. By contrast with *Scott*, 'malice' is a technical term in the context of this case.

In a criminal prosecution, the court "is required to define technical words and expressions, but not words and expressions which are of ordinary understanding and self-explanatory." *Lysoski*, 47 Wn.2d at 111. A term is 'technical' when it the legislature gives it a meaning that

differs from common usage. *State v. Brown*, 132 Wn.2d 529, 611, 940 P.2d 546 (1997).

In the context of correctly and completely instructing the jury as to what constitutes lawful force, 'malice' is a technical term, because the Legislature gives it a meaning that is not in common usage. By contrast, the challenged term in *Scott* was 'knowledge.' *Scott*, 110 Wn.2d at 686. In *Lysoski* the term was 'criminality.' *Lysoski*, 47 Wn.2d at 111. Neither of these are in any way technical terms.

Whether to define words used in an instruction is a matter for the trial judge's discretion. *State v. Guloy*, 104 Wn.2d 412, 417, 705 P.2d 1182 (1985). Here, the court obviously determined that 'malice' needed to be defined. It was, therefore, incumbent upon the court to define it correctly.

D. The truncated definition was worse than none at all.

In both *Scott* and *Lysoski*, no definitional instruction was given. Here, the court did define 'malice,' or purported to do so. But the court left out part of the definition that

was critical to O'Hara's defense. Reversal is required when an "omission or misstatement in a jury instruction relieves the State of its burden" of proving every essential element of the crime. *State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002); *State v. DeRyke*, 149 Wn.2d 906, 912, 73 P.3d 1000 (2003).

A conviction cannot stand if the jury is instructed in a manner that relieves the State of its burden of proof. *State v. Feeser*, 138 Wn. App. 737, 741, 158 P.3d 616 (2007), citing *State v. Cronin*, 142 Wn.2d 568, 580, 14 P.3d 752 (2000). An instruction that relieves the State of proving beyond a reasonable doubt an element of the crime upon which it bears the burden of proof is "constitutionally defective." *City of Seattle v. Patu*, 108 Wn. App. 364, 367, 30 P.3d 522 (2001).

Here, the State had the burden of disproving O'Hara's self- defense claim and proving beyond a reasonable doubt that lawful force was not justified.

If a 'to-convict' instruction purports to list all of the elements of a crime, it must in fact list all the elements.

State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). By analogy, it follows that an instruction that purports to define a technical term on a matter upon which the State has the burden of proof must define the term completely with respect to those parts of the definition relevant to the defense. If the instruction is not both correct and complete, "a conviction based upon it cannot stand." *See, Smith*, 131 Wn.2d at 263.

In the context of jury instructions, this Court has held that, as long as the instructions properly inform the jury concerning the elements upon which the State has the burden of proof, any error in further defining terms used in the elements is not of constitutional magnitude. *State v. Stearns*, 119 Wn.2d 247, 250, 830 P.2d 355 (1992), citing *Scott*, 110 Wn.2d at 689-91.

In *Stearns*, the Court of Appeals elected to review a challenge to a jury instruction that was not raised below. *State v. Stearns*, 59 Wn. App. 445, 447, 799 P.2d 270 (1990). This court elected not to review the alleged error, concluding it was not constitutional.

Division II had affirmed the conviction because the omitted language Stearns complained of related to a defense upon which he had presented no evidence at trial. *Stearns*, 59 Wn. App. at 446-47. This Court held that any error in the instruction is not of constitutional magnitude if the defense had the burden of proof at trial on that issue. *Stearns*, 119 Wn.2d at 250.

Stearns also is distinguishable from O'Hara's case. By contrast with *Stearns*, the defective instruction in O'Hara's case concerned an issue upon which the State, not the defense, had the burden of proof.

The Court of Appeals decision does not conflict with the cases offered by the State.

ISSUE 2. The Court of Appeals correctly concluded that O'Hara was prejudiced by the defective instruction. This holding is not subject to discretionary review under the considerations governing acceptance of review set forth in RAP 13.4(b).

When a jury instruction misstates the law of self-defense, prejudice is presumed. *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996). Reversal is required if the jury could have accepted the defendant's version of the

events but nevertheless found him guilty under the erroneous instruction. *O'Hara*, Slip Op. at 7-8; *Birnel*, 89 Wn. App. at 472.

In concluding that the constitutional error in this case was not harmless, the Court of Appeals addressed the specific facts of this case. RAP 13.4(b) does not include fact-specific holdings in its conditions governing review.

ISSUE 3. The decision does not implicate any issue of substantial public interest.

The lawful force statute says, in pertinent part: The use, attempt, or offer to use force upon or toward the person of another is not unlawful: Whenever used by a party about to be injured... in preventing or attempting to prevent ... a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary. RCW 9A.16.020(3).

Mr. O'Hara's jury was instructed that: "Malice" and "maliciously" shall import an evil intent, wish, or design to vex, annoy, or injure another person. RCW 9A.04.110(12).

But this is not what the Legislature decreed in enacting the lawful force statute. The Legislature added that malice also "may be inferred from an act done in willful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a willful disregard of social duty." RCW 9A.04.110(12).

The Court of Appeals correctly held that Ryan O'Hara had the right to have the jury deliberating on his defense fully instructed as to the law.

ISSUE 4. The Court of Appeals erred in holding that the Confrontation Clause permits the State to communicate to the jury that declarants who are not produced for cross examination implicated the defendant during police interrogation, so long as the testifying witness does not specify the precise words used in the out-of-court testimonial statements.

O'Hara argued in his appellant's brief that the testimony of Officers Yamada and Boothe as to their understanding of the facts based on statements made to them at the scene by Mr. Nevin, Ms. Gumm and various other people constitutes a variety of inadmissible evidence recognized by the court of Appeals as "backdoor hearsay."

See, State v. Martinez, 105 Wn. App. 775, 782, 20 P.3d 1062 (2001). Having police officers testify to the nature of their understanding after talking to a witness, instead of reporting what the witness actually said, is "simply an attempt to circumvent the [hearsay] rule." *Martinez*, 105 Wn. App. at 782.

Division III itself held that the fact that an out-of-court declarant's precise words were not repeated in court is immaterial. *Martinez*, 105 Wn. App. at 782, citing *United States v. Sanchez*, 176 F.3d 1214, 1222 (9th Cir.1999) (citing *United States v. Check*, 582 F.2d 668, 683 (2d Cir.1978)). "Inadmissible evidence is not made admissible by allowing the substance of a testifying witness's evidence to incorporate out-of-court statements by a declarant who does not testify." *Martinez*, 105 Wn. App. at 782; *Sanchez*, 176 F.3d at 1222; *Check*, 582 F.2d at 683.

Here, Division III held that the testimony of Yamada and Boothe was not inadmissible as hearsay because they did not testify to the precise words used by the people at the scene. Having concluded the testimony was not hearsay, the

Court of Appeals then concluded that O'Hara's assignment of error was without merit. But O'Hara did not argue for reversal based on a hearsay violation – not least because there was no hearsay objection. Rather, O'Hara asserted a *Crawford* violation.

Informing the jury that people at the crime scene made statements incriminating Mr. O'Hara without producing the declarants for cross examination was impermissible under *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The out-of-court statements were testimonial and violated the Sixth Amendment Confrontation Clause. *Crawford*, 541 U.S. at 68.

Whether the officers' testimony was or was not excludable hearsay under the rules of evidence is not the dispositive inquiry. *Crawford* resoundingly rejects the notion that the protections of the Confrontation Clause are limited by the rules of evidence. *Crawford*, 541 U.S. at 50-51. "Leaving the regulation of out-of-court [testimonial] statements to the law of evidence would render the Confrontation Clause powerless... ." *Id.* "Where testimonial

statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence[.]" *Crawford*, 541 U.S. at 61.

This means that all evidence regarding all out-of-court testimonial statements is excluded from criminal trials, unless the declarant is unavailable and the defendant had an opportunity to cross-examine. *Crawford*, 541 U.S. at 68.

A Confrontation Clause violation requires reversal unless the State can prove the error was harmless beyond a reasonable doubt. *State v. Davis*, 154 Wn.2d 291, 304, 111 P.3d 844 (2005); *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Moreover, whenever evidence is admitted in violation of due process, reversal is required, even though the inadmissible evidence consists merely of inference or innuendo. *State v. Babich*, 68 Wn. App. 438, 444, 842 P.2d 1053 (1993). It is sufficient for reversal that the jury received the impression that otherwise inadmissible evidence is fact. *Id.* That is, whenever an impermissible inference is implanted in the jury's consciousness. *Id.*; *State v. Yoakum*,

37 Wn.2d 137, 144, 222 P.2d 181 (1950); *United States v. Silverstein*, 737 F.2d 864, 868 (10th Cir.1984).

A *Crawford* violation is always prejudicial, unless the untainted evidence is overwhelming. *Guloy*, 104 Wn.2d at 426. Because the bystanders' statements could not be tested by cross examination, we must assume that their damaging potential was fully realized. *See, Guloy*, 104 Wn.2d at 425; *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986).

To decide who assaulted whom, O'Hara's jury had to choose between conflicting accounts by Lorree and O'Hara. The damage we must assume here is that the jury inferred that bystanders at the scene gave police a version of events that incriminated O'Hara and exonerated Lorree.

VI. CONCLUSION

Ryan O'Hara asks the Court to deny the petition for review for failure to establish grounds as set forth in RAP 13.4(b). If review is granted, O'Hara asks the Court to affirm on the jury instruction issue. O'Hara asks the Court to reverse that part of the decision that erroneously held that

the Confrontation Clause does not apply to damaging inference and innuendo.

Respectfully submitted this 18th day of January, 2008.

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I certify on penalty of perjury under the laws of the State of Washington that I mailed this day, first class postage prepaid, copies of this Answer to the Petition to:

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